United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1625

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA ex rel. ANDREW LEE STEWART,

Petitioner-Appellant,

-against-

THE HONORABLE LEON J. VINCENT, Superintendent, Green Haven Correctional Facility, Stormville, New York,

Respondent-Appellee.

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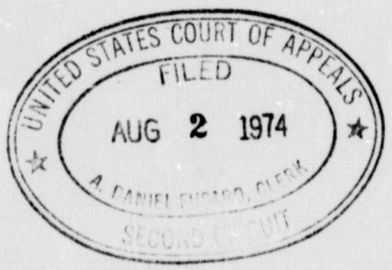
B/S

BRIEF FOR RESPONDENT-APPELLEE



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BRIEF FOR RESPONDENT-APPELLEE

Question Presented

Did the failure of the Court at petitioner's state court trial to excuse a juror who admitted that at one time he had a casual acquaintance with one of the prosecution witnesses and who had a short, non-trial related conversation with that witness during a recess of the trial, constitute an error of such constitutional magnitude as to vitiate his subsequent conviction?

Statement

In this appeal from a denial of his writ of habeas corpus, petitioner, Andrew Lee Stewart, asserts that the refusal of the state court judge at his trial to excuse a juror who

at one time had a casual acquaintance with one of the prosecution witnesses, and who had a short non-trial related conversation with the witness during a recess of the trial, constitutes an error of such constitutional magnitude as to vitiate his subsequent conviction.

Petitioner's claim was dismissed by the United States District Court for the Eastern District of New York (Costantino, J.) in a memorandum opinion dated April 16, 1974. The opinion also dismissed several other claims which are not raised in petitioner's brief herein and must therefore be deemed to have been waived. On April 30, 1974 Judge Costantino granted petitioner a certificate of probable cause.

Facts

A. The Background of Petitioner's convictions

Petitioner was convicted of two counts of robbery in the first degree, following a jury trial in Suffolk County Court (Lipetz, J.) that lasted from June 15-22, 1974. On September 2, 1970 he was sentenced on each court to two indeterminate terms of imprisonment with a 25 year maximum. He is presently incarcerated at Green Haven Correctional Facility.

The pertinent factual circumstances involved in petitioner's answer have been set forth in the testimony of the various prosecution witnesses who testified at the trial. These circumstances can be summarized as follows:

JOSEPHINE HAUPT (Trial Minutes, 91-326) and KAREN DE CASTRI (T 326-529), each separately testified that on the night of November 15, 1969 at approximately 8:45 p.m., Stewart entered a liquor store in the town of Riverhead, owned and operated by Mrs. Haupt (T 94). Miss De Castri, a niece of Mr. Haupt's who was helping out in the store, waited on Stewart (Haupt: T 267; De Castri: T 339-341). The store was well lit (Haupt: T 93). After making a purchase and being observed by both women, Stewart left (Haupt: 267; De Castri: T 339-341).

Some 15 minutes later, at approximately 9:00 p.m., Stewart returned to the store, this time armed with a gun (Haupt: T 103-104; De Castri T 348-353). He ordered Mrs. Haupt into the back of the store and, when she refused to comply and instead ordered him out, he struck her in the face and began beating her (Haupt: T 107-108, 111; De Castri: T. 351). He also beat Miss De Castri, who came to her aunt's aid (De Castri: T. 353). Both women sustained serious injuries and required extensive hospitalization for the injuries (Haupt: T 114-115; De Castri: T 357-360). Petitioner escaped with the proceeds in the cash register - some $126 (Haupt: T 114,118) -- and Miss De Castri's pocketbook, which contained a wallet with her identification and $9 (De Castri: T 329-331).

The separate testimony of ROBERT QUINN (T 531-662) and FRANKLIN BRUNSKILL (T 662-763), each a police officer in the town of Riverhead, indicated that in response to a radio call they arrived at the liquor store in their police car within a few minutes of the crime (Quinn: T 533; Brunskill: T 665-666). Within two or three minutes of the time they left the liquor store, they saw in their car headlights a man running from them with a women's pocketbook (Quinn: T 539-540). They chased the man into the woods and eventually Brunskill tackled him (Brunskill: T 665-666; 668-673; Quinn: T 543-544; 599). In the pocketbook they found "several cards and pieces of identification identifying the pocketbook as belonging to a Karen De Castri" (Quinn: T 558); they also found in the pocketbook $59 in loose money, a wallet belonging to Miss De Castri with $9 in it, and a black starter pistol (Quinn: T 558-561; 563; Brunskill: T 722-723). They then arrested Stewart.

Petitioner introduced no witnesses at trial to controvert the People's case. He also did not take the stand.

B. <u>The Background of Petitioner's Present Claim</u>.

Petitioner's present claim arises from the fact that at some point prior to the events at issue herein, one of the jurors (Napoli) and Police Officer Brunskill were co-employees at the Gruman Aircraft Corporation.

This alleged acquaintance became known to the court at the conclusion of respective counsel's opening statements and the following obviously pertinent exchange then occurred between the court and the juror:

> THE COURT: Mr. Napoli?
>
> JUROR NO. 10 [Mr. Napoli]: Yes sir.
>
> THE COURT: Did you know Patrolman Brunskill well?
>
> JUROR NO. 10: No. I only knew him as a worker. I worked with him at Grumman's and I didn't know that he was an officer at this time.
>
> THE COURT: Did you have any personal relationship with him?
>
> JUROR NO. 10: No, sir. Other than just playing softball together and we were in Grumman's league during lunch hour.
>
> THE COURT: Does the fact that you know Patrolman Brunskill to the extent that you do make any difference to you in your consideration of this case?
>
> JUROR NO. 10: No, sir. None whatsoever.
>
> (T 89-90).

Defense counsel then objected to Napoli's presence on the jury, but the objection was denied (T. 91).

Subsequently, during the course of his testimony on June 19, 1970, Police Officer Brunskill indicated that several days previously -- "Tuesday, I think" (T 682) -- he and Napoli had had a brief conversation on the courthouse during a lunch-time recess of the trial.* Brunskill indicated that he was out of uniform at the time and unaware that the Stewart case had started (T 684-685). Upon further questioning by the court, Brunskill stated that he had asked Napoli what he was doing and Napoli told him he was working in an "electronic place or something like that" (T 686). Brunskill then asked Napoli what he was doing around the courthouse and Napoli told Brunskill he was a juror in the Stewart case (T 686). Nothing else was said (T 687).

At this point, counsel for defendant moved for a mistrial (T 687). The motion was denied (T 687).

Prior Proceedings

Petitioner's present claim was exhausted in the state courts on direct appeal from the Suffolk County Court conviction. The conviction was affirmed by the Appellate Division, Second Department on December 6, 1971 (People v. Stewart, 38 A D 2d 689); on February 2, 1972, the New York Court of Appeals denied leave to appeal.

* June 19, 1970 was a Friday. Since the conversation between Brunskill and Napoli seems to have taken place on Tuesday (the second day of trial), this was three days prior to the time Brunskill testified.

In the decision below, Judge Costantino, like the state courts, found inter alia, that petitioner's claim was "without merit." The judge then went on to note that even "assuming arguendo that [the claim]... constitute(d) errors under the state law, [it] did not give rise to a violation of the federally protected right to a fundamentally fair trial."

ARGUMENT

THE FAILURE OF THE TRIAL COURT TO EXCUSE JUROR NAPOLI WAS AN ENTIRELY PROPER EXERCISE OF JUDICIAL DISCRETION; PETITIONER'S HABEAS CORPUS APPLICATION MUST IN ALL RESPECTS BE DISMISSED.

As our preceding discussion (supra, pp. 4-5) has suggested, petitioner's claim, in essence, involved two rulings by the trial court: (1) the refusal to excuse Napoli on the basis of his per se admission that he was at one time acquainted with Brunskill (Pets. Brief, p. 10, referring to T 89-90); (2) the refusal to declare a mistrial or excuse Napoli, following a revelation by witness Brunskill that he and Napoli had had a brief conversation on the steps of the courthouse on the second day of the trial (Pets. Brief p. 11, referring to T 662-668).

However, any reasonable reading of the pertinent testimony of juror Napoli (T 89-90) and Officer Brunskill (T. 682-688) plainly indicates that the so called errors (supra), in

fact amounted to thoroughly reasonable exercises of judicial discretion (See Part A, infra); in any event, even assuming that there were errors, in view of the overwhelming evidence against Napoli -- evidence that existed independently of Brunskill's testimony -- it is clear that the errors are not reviewable in this Court since they did not rise to the level where they deprived petitioner of his constitutionally protected right to a fair trial (See Part B, infra). See Lisenba v. California, 314 U.S. 219, 236 (1941); United States v. Valdes, 417 F. 2d 335, 336 (2d Cir. 1969), cert den. 399 U.S. 912 (1969); United States ex rel. Mintzer v. Dros, 403 F. 2d 43 (2d Cir. 1967), cert den. 393 U.S. 1088 (1968); United States ex rel. Birch v. Fay, 190 F. Supp. 105, 107 (S.D.N.Y. 1961), as cited at p. 3 of the opinion below.

A.

At the outset -- and, in particular with regard to the first ruling of the Court -- it should be noted that the "personal acquaintanceship" between Napoli and Brunskill was, in fact, hardly that (see Napoli's testimony at T 89-91). Responding to the probing questions asked of him by the court at the start of the trial, Napoli indicated that he knew Brunskill through

their mutual association with Grumman Industries. Napoli said that the two men had participated in the same lunch-time soft-ball league, but they did not know each other personally or socially (T 90).* Napoli then went on to indicate that the acquaintance would have no effect -- "none whatsoever" (T 90) -- on his ability to render a fair verdict.

Not surprisingly, the court gave full credit to this last assertion. This ruling was undoubtedly founded on the well-established rule that the mere fact that a juror may have a "preconceived notion" as to a case is not "without more... sufficient to rebut the presumption of [his] impartiality". Irvin v. Dowd, 366 U.S. 717, 723 (1973); U.S. v. Davis, 456 F.2d 1192, 1195-1196 (10th Cir. 1972); Stewart v. United States, 394 F. 2d 778 (D.C. Cir. 1968); Little v. U.S., 331 F. 2d 287 (8th Cir. 1964), cert den. 379 U.S. 834 (1964); Steiner v. United States, 229 F. 2d 745 (9th Cir. 1956). Indeed, as the court noted in the Irvin case (id, at 713):

> "It is sufficient if the juror can lay aside his impression or opinion and render a verdict on the evidence presented in court." (id. at 723).

* Significantly, the "acquaintance" apparently ended at the time that the work association ended, which was before the time of the trial.

As for the conversation between Napoli and Brunskill which led to the Court's second ruling (supra), the record plainly indicates that this amounted to a brief and all together harmless exchange of pleasantries (T 682-688). Having encountered Napoli on the steps of the courthouse during a lunchtime recess (T 682-683), Brunskill asked him where he was working (T 680); then, apparently because he was unaware that a jury had been selected in petitioner's case and that Napoli was a juror (T 684-685), Brunskill asked Napoli what he was doing around the courthouse (T 680). Upon learning his former co-employee was a juror in the Stewart case, the conversation ended (T 686).*

Since the only reference in the Napoli-Brunskill "conversation" to the Stewart case consisted of Napoli's comment that he was serving on the jury, it is clear that petitioner's assertion that the encounter "establish(es)...that (Napoli) was susceptable to outside influences" (Brief, p. 11) amounts to fantasy rather than reality. Moreover, although the

* It seems clear that this description of the Brunskill-Napoli conversation constitutes, in essence, a factual finding by the state court, and, as such, is entitled to a strong presumption of correctness. 28 U.S.C. 2254(d) as discussed in LaVallee v. Delle Rose, 410 U.S. 690 (1973) (per curiam); also, U.S. ex rel. Gonzalez v. Zelker, 477 F. 2d 797 (2d Cir. 1973).

conversation represented, in the narrowest sense, a technical violation of the Court's admonition to the jury not to discuss the case with anyone (e.g. T 217; Pet's Brief, pp. 5-6), the violation hardly required the drastic step of a declaration of a mistrial or the excusing of Napoli, who had already sat through four days of extremely damaging testimony to Stewart given by three other witnesses besides Brunskill.

Thus it is clear that the so-called errors committed with regard to juror Napoli were in reality entirely reasonable acts of judicial discretion, made only after an eliciting of the pertinent facts. See Irvin, Davis, Stewart, Little and Steiner cases cited supra, p. 9; also U.S. v. Addonizio, 451 F. 2d 49 (3d Cir. 1972), cert den. 405 U.S. 936 (1972), reh. den. 405 U.S. 1048 (1972).*

* Needless to say, as noted by petitioner, there are also cases involving situations where juror contact with a witness has led to the dismissal of the juror. E.g. U.S. v. DiPrima, 472 F. 2d 550, 552 (1st Cir. 1973); Jordan v. U.S., 408 F. 2d 1305 (D.C. Cir. 1969), both cited in petitioner's brief at p. 11. The crucial point is that since each instance of juror-witness contact has its own particular set of circumstances, the ultimate determination as to juror prejudice must inevitable rest in the discretion of the trial court, unless such exercise of discretion is "clearly erroneous". Little, case, cited supra, 331 F. 2d at 295, citing Mattox v. United States, 146 U.S. 140 (1892); also Davis and Stewart cases, supra, at p. 9. Here, as we have indicated, supra, the trial court's actions were entirely logical and proper.

B.

Ultimately, petitioner's present claim must be measured against the simple reality that the verdict returned against him was founded on massive evidence of his guilt -- evidence that existed irrespective of Officer Brunskill's testimony and dwarfed any prejudice that may have inured to petitioner from the Napoli-Brunskill "acquaintance". See Schneble v. Florida, 405 U.S. 427 (1972), noting at 430, that where "properly admitted evidence of guilt is...overwhelming," insignificant, collateral constitutional errors may be deemed "harmless error"; also Harrington v. California, 395 U.S. 250, 254 (1969); Chapman v. California, 386 U.S. 18 (1967), reh. den. 386 U.S. 987 (1967).

The testimony of prosecution witnesses Haupt, De Castri, and Quinn, plainly shows, inter alia, that Stewart's identification followed a lengthy, face to face, tense encounter with his robbery victims; that he was captured by the police within minutes of the crime, in the act of flight, with the proceeds -- including Miss De Castri's pocketbook -- in his hands; that, finally, at the time of his capture his clothes were covered with blood and he was in possession of the pistol he used to rob the

liquor store. The testimony of Officer Brunskill -- rather than being "essential" to the People's case, as suggested by petitioner (Brief, pp. 4-5, 12) -- merely complemented earlier testimony supplied by his partner, Officer Quinn; indeed the most critical testimony -- the very heart of the People's case -- consisted of the detailed accounts of the two female victims of the robbery.

Petitioner's claims of juror prejudice are clearly contrived and unsubstantial. Irvin, case, supra, p. 9; Schneble case, supra, p. 12. They must in all respects be dismissed.

CONCLUSION

PETITIONER'S APPLICATION FOR HABEAS CORPUS RELIEF SHOULD IN ALL RESPECTS BE DENIED.

Dated: New York, New York
July 31, 1974

Respectfully submitted,

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STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

MAGDALINE GIORDANO, being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Respondent-Appellee Vincent herein. On the 1st day of August, 1974, she served the annexed upon the following named person:

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Attorney for Petitioner
c/o Legal Aid Public Defenders Unit
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United States Courthouse
Foley Square
New York, New York 10007

Attorney in the within entitled proceeding by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by her for that purpose.

Magdaline Giordano

Sworn to before me this
1st day of August, 1974

Assistant Attorney General
of the State of New York